EC-P-1998-16

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 26 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Issuance of Administrative Compliance Orders in light of Harrison v. PPG Industries, Inc.

FROM: Director
Division of Stationary Source Enforcement

TO: Enforcement Division Directors
Regions I-X

The Supreme Court recently ruled that NSPS applicability determinations are "final agency actions" and, as such, are reviewable only in the Court of Appeals for the appropriate circuit pursuant to Section 307(b) of the Clean Air Act, Harrison v. PPG Industries, Inc., ____US____, 48 USLW 4585 (1980), (copy attached). In holding that final actions are reviewable solely in the Court of Appeals, the Court's decision could have an impact on more enforcement related activities than just applicability determinations. The proper venue for the review of final actions is now settled, but the question of what is a final action for purposes of Section 307 will undoubtably be the subject of future litigation. This memorandum addresses the issue as it relates to administrative compliance orders under Sections 113(a) and 167 of the Clean Air Act (hereinafter referred to as immediate compliance orders).

Sections 113(a)(1) and 113(a)(3), when read in conjunction with sections 110(i), and 111(e) and 112(c) respectively, are designed to provide an administrative means for requiring a source to immediately comply with specified provisions of the Clean Air Act. The compliance date established by these orders must be no longer than 30 days from the effective date of the order. These orders have been used to require sources to correct relatively easily remedied violations, such as deficient operation and maintenance practices, inadequate reporting, or failure to conduct performance tests. Section 113(a)(3) orders are also used to require sources to satisfy Agency requests made under Section 114 of the Clean Air Act. Sections 113(a)(5) and 167 are designed to provide an administrative means of stopping the construction or modification of sources proceeding in violation of the Clean Air Act.

The Agency and the Department of Justice have taken the position that orders issued under Sections 113(a) and 167 are not final agency actions and, therefore, are not reviewable except as pertinent in defense of an action taken under Section 113(b) to enforce the order. Because of the specific notice provision of Section 113(d) of the Act, the issuance of or approval of Delayed Compliance Orders under Section 113(d) follow the informal rulemaking procedures of 5 USC 553, and are therefore considered to be final agency actions. This position protects the issuance of an immediate compliance order from legal challenge until the Agency brings an action in the district court to enforce the order. This avoids the problem of pre-enforcement review of Agency actions which may have the result of hampering further enforcement activities.

Thus, the Agency and Department are prepared to continue to argue that immediate compliance orders are not final agency actions. At least one Court of Appeals has upheld this position.[1] However, other sources are currently challenging,

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1/ Lloyd A. Fry Roofing Co. v. U.S.E.P.A. 554 F.2d 885, (8th Cir. 1977), (Judicial review of abatement order under Section 113(a)(1) on grounds of technological or economic feasibility is inconsistent with the enforcement mechanism of the Clean Air Act, and contrary to legislative history).

The following cases have also addressed the issue of pre-enforcement review under Title I of the Clean Air Act:

a. West Penn Power Co. v. Train, 552 F.2d 302 (3rd Cir. 1975), (Decision to enforce NOV is discretionary and hence unreviewable under the Administrative Procedure Act (APA), 5 USC 701(a)(2); issuance of NOV is not final agency action, hence unreviewable pursuant to APA, since it may or may not be followed by a compliance order or civil action, 5 USC 704). But see, West Penn Power Co. v. Train, 538 F.2d 1020 (3rd Cir. 1976), cert. den. 426 U.S. 947, reh. den. 429 U.S. 873 (Dictum: holding of West Penn I not dispositive of question of reviewability of compliance order).

b. Union Electric Co. v. E.P.A., 593 F.2d 299 (8th Cir. 1979), (NOV is procedural prerequisite to abatement order and not reviewable on motion for temporary stay of enforcement).

c. Philadelphia Electric Co. v. Costle, No. 78-4170, (E.D. Pa. 1978), (NOV reviewable on purely legal issue of effect of 1977 Clean Air Act Amendments on pre-existing consent order, pursuant to 28 USC §1331).

d. Chrysler Corporation v. E.P.A., No. IP 77-371-C, (S.D. Ind. 1979), (NOV is final agency action and reviewable on purely legal issue of applicability of regulations to source, pursuant to 28 USC §1331). Accord, Ashland Oil, Inc. v. McDonald, No. C79-338 (N.D. Ohio, order denying motion to dismiss dated June 11, 1980).

and can be expected to challenge, immediate compliance orders by asserting that they are final actions and seeking the jurisdiction of a Court of Appeals under the PPG decision. Thus, prior to the issuance of an immediate compliance order, the Regional Office should be sensitive to the possibility that a case raising this issue, and the merits of the order itself, will be initiated by the source.

Regardless of how a particular Court of Appeals decides the issue of whether the immediate compliance order is a final action and thus reviewable, the mere fact of the challenge can divert Agency resources from enforcement to the defense of a collateral action. This may hamper enforcement, especially if a subsequent enforcement action in the district court is stayed pending resolution by the Court of Appeals.

For this reason, while an order can be effective in appropriate circumstances, consideration should be given to alternative courses of action as well. An enforcement action in the district court, including the filing of a motion for a preliminary injunction, may be the most appropriate response in some cases, especially where a source is constructing in violation of new source requirements. The Department of Justice has committed to expedite its review of cases involving this type of violation, and to assist the Agency in insuring that delays in the filing of such actions are minimized.

A second enforcement tool that has been successfully used is the show cause conference. Under this procedure, a source is notified by letter that the Regional Office has evidence indicating that it is in violation of the Act, and offers the source an opportunity to meet with the Region in order to demonstrate why a judicial action should not be pursued against the source. This serves the purposes of informing the source of the Agency's position, and initiates a meeting where measures to remedy the violation can be discussed. If this procedure does not result in an agreement leading to prompt resolution of the violation, the Regional Office should proceed with a judicial enforcement action.

If, after considering the above factors, a Regional Office determines that an immediate compliance order is appropriate, I recommend that the Regional Office prepare for the possibility of a challenge in the Court of Appeals by carefully developing an administrative record supporting the action. An adequate administrative record will be important not only if the particular Court of Appeals rules that the order is a final agency action,

but also if a court postpones a decision on this issue pending review of the record supporting the order.[2] Thus, prior to the issuance of the order, the administrative record should contain evidence of each element of the applicability of the relevant statutory and regulatory requirements, and of the violation. Where the record contains some evidence favorable to the source, the record should also explain that the evidence was considered and why it was rejected, i.e., what evidence favorable to the Agency's position outweighs or refutes the evidence favorable to the source.

If you have any questions with regard to this issue, please feel free to contact me at 755-2550 or Edmund J. Gorman of my staff at 755-2570.

Edward E. Reich

Attachment

[2] In Hooker Chemical Co. v. E.P.A., No. 79-2194 and Tenneco Chemicals, Inc. v. Beck, No. 79-2567, the Court of Appeals for the Third Circuit referred the action to a merits panel to review the orders.

EC-6-1998-14

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 21 1982

OFFICE OF
AIR, NOISE AND RADIATION

MEMORANDUM

SUBJECT: Definition of "Continuous Compliance" and Enforcement of O&M Violations

FROM: Kathleen M. Bennett
Assistant Administrator for Air, Noise and Radiation

TO: Directors, Air and Waste Management Divisions
Regions I-IV, VI-VIII and X

Directors, Air Management Divisions
Regions V and IX

The purpose of this memo is to provide you with some general programmatic guidance as to the meaning of the term "continuous compliance" and the role of operation and maintenance (O&M) requirements in assuring that continuous compliance is maintained. Of course, source specific guidance on O&M measures which can assure continuous compliance is an essential part of this program and this memorandum is not intended to substitute for such guidance. As you know, DSSE has undertaken a number of initiatives related to the continuous compliance effort and we hope to discuss the progress of those efforts with you at the upcoming workshop at Southern Pines. DSSE will be forwarding to you an updated summary of those activities prior to the workshop. However, given the continuing attention being given to "continuous compliance," I think it would be helpful to have a common understanding of what that concept entails.

In the strict legal sense, sources are required to meet, without interruption, all applicable emission limitations and other control requirements, unless such limitations specifically provide otherwise. However, of primary concern to the Agency are those violations that could have been prevented, through the installation of proper control equipment and the operation and maintenance of that equipment in accordance with proper procedures. We believe the concept of continuous compliance is essentially the avoidance of preventable excess emissions over time as a result of the proper design, operation and maintenance of an air pollution source. This includes avoidance of preventable instances of excess emissions, minimization of

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emissions during such instances, and the expeditious termination of any instances which do occur.

In determining the appropriate enforcement response to a violation, one factor the Regions should consider is whether the source had in place an active program designed to maintain continuous compliance. Such a program would normally involve one or more of the following elements: continuous or periodic self-monitoring of emissions; monitoring of operating parameters such as scrubber pressure drop, incinerator combustion temperature or flow rates; maintenance of a spare parts inventory; maintenance of spare control device modules; and procedures designed to correct the types of violations that are most likely to occur. Evaluating a violator's O&M program is a necessary step in determining the type and degree of relief that an enforcement action could be expected to achieve.

Documentation of avoidable departures from proper procedures as just discussed may be used not only as supporting evidence in cases involving emission limit violations, but as primary evidence in cases involving violations of O&M requirements specified in permits and regulations. As the Agency continues to place more emphasis on O&M requirements in the context of national standards, and to encourage States to develop O&M requirements, the enforcement program must be adapted to address violations of these requirements. A violation of specified O&M requirements, even in the absence of documented emission limit violations, can be an appropriate trigger for EPA enforcement response.

In conclusion, evaluation of a source's continuing compliance program would be useful both in determining the appropriate Agency response to an emission limit violation, and in assessing the source's compliance with specified O&M requirements.

If my staff can be of assistance in evaluating specific cases, please feel free to call John Rasnic at 382-2826.